

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 08-N-13044-RAH;
)	08-O-13359 (Cons.)
DAVID RICHARD ORTEGA,)	
)	DECISION AND ORDER OF
Member No. 113890,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
A Member of the State Bar.)	

I. Introduction

In this consolidated default disciplinary matter, respondent **David Richard Ortega** is charged with probation violations and with failing to comply with California Rules of Court, rule 9.20,¹ as ordered by the California Supreme Court on May 13, 2008, in S161737.

In view of respondent’s misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent an Amended Notice of Disciplinary Charges (NDC) on March 12, 2009, in case No. 08-N-13044² and a NDC on April 15, 2009, in case No. 08-O-13359 at his

¹ All references to rule 9.20 are to California Rules of Court, rule 9.20.

² On March 5, 2009, the original NDC in case No. 08-N-13044 was filed and properly served on respondent at his official membership records address.

official membership records address. Respondent filed his responses to the Amended NDC in case No. 08-N-13044 and to the NDC in case No. 08-O-13359 on May 18, 2009.

On June 12, 2009 an in-person status conference was held. Participating in-person was Christine A. Souhrada, the deputy trial (DTC) for the State Bar; also participating in-person was respondent, who represented himself. At that status conference the court ordered a pretrial conference to be held in-person at 9:30 a.m. on October 1, 2009. The court also ordered that pretrial statements were to be filed on or before September 24, 2009. Additionally, the court ordered that case Nos. 08-O-13359-RAH and 08-N-13044-RAH be consolidated.

Respondent did not file a pretrial statement; nor did he appear at the October 1, 2009 pretrial conference. Respondent also did not appear at the trial in this matter on October 7, 2009.

On October 7, 2009, the court entered respondent's default in the consolidated matters. On October 10, 2009, respondent was enrolled as an inactive member under Business and Professions Code section 6007(e).³ A copy of the Order of Entry of Default and Order of Involuntary Inactive Enrollment was sent to respondent at his official membership records address through the United States Postal Service by regular first class mail, with postage thereon fully prepaid.

The State Bar filed a brief on culpability and discipline in the consolidated matters on November 3, 2009. On that same date, the consolidated matters were submitted for decision.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDCs are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

³ All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

Respondent was admitted to the practice of law in California on June 14, 1984, and has been a member of the State Bar of California at all times since that date.

A. Background – S161737

Respondent's misconduct in these two consolidated matters arises from his failure to comply with a disciplinary order – S161737. The Supreme Court order was filed on May 13, 2008. The California Supreme Court ordered, among other things, that respondent be suspended from the practice of law for four years and that he remain suspended until he has complied with the requirements of standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of the suspension be stayed, and that he be placed on probation for three years subject to the conditions of probation, including an actual suspension of two years and until he has shown satisfactory proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) and until he makes specified restitution. Additionally, the Supreme Court ordered that respondent comply with the other conditions of probation recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation. filed on January 23, 2008. (Supreme Court case No. S161737; State Bar Court case No. 06-O-10354 et al.) The Supreme Court further ordered respondent to comply with rule 9.20 (a) and (c), within 30 and 40 days, respectively, after the effective date of the Supreme Court order. The Supreme Court order became effective June 12, 2008, and was properly served on respondent by the Clerk of the Supreme Court.

B. Case No. 08-O-13359

On January 16, 2008, respondent entered into a Stipulation Re Facts, Conclusions of Law and Disposition (Stipulation) with the State Bar of California in case Nos. 06-O-10354, 06-O-13315, 06-O-13536, and 07-O-15030. On January 23, 2008, the Hearing Department of the State Bar Court filed an Order Approving Stipulation, ordering, among other things, that

respondent be suspended from the practice of law for four years and that he remain suspended until he has complied with the requirements of standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of the suspension be stayed, and that he be placed on probation for three years subject to the conditions of probation, including an actual suspension of two years and until he has shown satisfactory proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) and until he makes specified restitution.⁴ On January 23, 2008, the hearing department's order approving stipulation was properly served upon respondent at his membership records address. Respondent received the order approving stipulation and was aware of the order and its contents.

As set forth, *ante*, on May 13, 2008, the California Supreme Court filed Order No. S161737 (State Bar Court case No. 06-O-10354 et al.) (Supreme Court Order). The Supreme Court Order and suspension became effective June 12, 2008.

Pursuant to the Supreme Court Order, respondent was required to comply with the conditions of probation recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation. Among other conditions, respondent was required to:

1. Contact the Office of Probation within 30 days after the effective date of discipline and schedule a meeting with respondent's assigned probation deputy to discuss the terms and conditions of probation.

⁴ Paragraph 4 of the NDC in case No. 08-O-13359 incorrectly states, "On or about January 23, 2008, the Hearing Department of the State Bar Court filed its Order approving the Stipulation and imposing upon respondent a stayed suspension of four years and until he pays restitution with four years probation (the "Order")." However, Exhibit 3 of the State Bar, which has been admitted into evidence in this proceeding, includes a certified copy of the State Bar Court's January 23, 2008 Order Approving Stipulation, which imposes a four-year stayed suspension and a three-year probation period with conditions, including a two-year actual suspension.

2. Submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10, of the period of probation.

3. Pay restitution to Jong Song (Song) in the amount of \$1,830 and to Leticia Madrigal (Madrigal) in the amount of \$500, plus interest in monthly installments of \$100 to Song and Madrigal, each, and to provide proof of payment to the Office of Probation with each quarterly report; and

4. Provide written notice within 60 days of the effective date of discipline to Madrigal of her right to initiate and participate in binding fee arbitration, and provide copies of such notices, certified mail receipts, and return receipts to the Office of Probation.

On June 7, 2008, the Office of Probation wrote a letter to respondent, reminding him of the terms and conditions of the Stipulation and Supreme Court Order, as well as his reporting and restitution requirements and due dates. Attached to the letter was a copy of the Supreme Court Order, a copy of the portion of the Stipulation setting forth the conditions of respondent's probation, proof of payment instructions, quarterly report instructions, and a "Quarterly Report" form. The letter was mailed on or about June 7, 2008, via the United States Postal Service, first class postage prepaid, in a sealed envelope addressed to respondent at his official State Bar membership records address. The June 7, 2008 letter was not returned as undeliverable by the United States Postal Service. Respondent received the June 7, 2008 letter from the Office of Probation.

Respondent failed to comply with the conditions of probation as follows:

- Respondent did not schedule or attend a meeting with his assigned probation deputy on or before July 12, 2008, as required;

- Respondent did not timely file his quarterly reports that were due on October 10, 2008, January 10, 2009, and April 10, 2009;⁵
- Respondent did not pay restitution, as required, and did not provide proof of payment of restitution to the Office of Probation; and
- Respondent did not provide the Office of Probation with proof of written notice to Madrigal of her right to initiate and participate in binding fee arbitration.

Count 1: Failure to Comply With Probation Conditions (§ 6068, Subd. (k))

Section 6068, subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation.

The court concludes by clear and convincing evidence that by not contacting or meeting with the Office of Probation; by not timely filing the quarterly reports that were due on October 10, 2008, January 10, 2009, and April 10, 2009; by not paying restitution as required by Supreme Court Order S161737, as recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation filed on January 23, 2008; by not providing proof of payment of restitution to the Office of Probation; and by not providing the Office of Probation with proof of written notice to Madrigal of her right to initiate and participate in binding fee arbitration, respondent failed to comply with conditions attached to his probation under Supreme Court Order No. S161737 in willful violation of section 6068, subdivision (k).

C. Case No. 08-N-13044

On May 13, 2008, the California Supreme Court filed Order No. S161737 (State Bar Court case No. 06-O-10354 et al.) (Supreme Court Order). The Supreme Court Order included a

⁵ On April 15, 2009, the date of the filing of the NDC in case No. 08-O-13359, respondent had not yet filed the quarterly reports that were due on October 10, 2008, January 10, 2009, and April 10, 2009. Trial exhibit six, which was admitted as evidence in this proceeding, shows that on September 2, 2009, respondent untimely filed the reports, which had been due on October 10, 2008, January 10, 2009, and April 10, 2009.

requirement that respondent comply with Rule 9.20, California Rules of Court, by performing the acts specified in subdivisions (a) and (c) within 30 days and 40 days, respectively, after the effective date of the Supreme Court Order.

On or about May 13, 2008, the Clerk of the California Supreme Court properly served upon respondent a copy of the Supreme Court Order imposing discipline and directing respondent to comply with rule 9.20. Respondent received the Supreme Court Order.

California Rules of Court, rule 9.20(c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.”

As noted, *ante*, the Office of Probation mailed a letter to respondent on June 7, 2008. Included in that letter was a reminder to respondent of his obligation to comply with rule 9.20, the deadline for filing the rule 9.20 affidavit, and an accurate copy of the Supreme Court Order. (Exhibit 7.)

As the Supreme Court Order became effective on June 12, 2008, respondent was obligated to comply with subdivision (a) of rule 9.20 no later than July 12, 2008, and was ordered to comply with subdivision (c) of rule 9.20 no later than July 22, 2008.

Respondent, however failed to timely file with the clerk of the State Bar Court an affidavit of compliance with rule 9.20, as required by California Rules of Court, rule 9.20(c).⁶ Whether respondent is aware of the requirements of rule 9.20 or of his obligation to comply with those requirements is immaterial. “Willfulness” in the context of rule 9.20 does not require actual knowledge of the provision which is violated. It is not necessarily even dependent on showing the respondent’s knowledge of the Supreme Court’s order requiring compliance. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342; *Hamilton v. State Bar* (1979) 23 Cal.3d

⁶ Respondent filed his rule 9.20 affidavit on August 27, 2009, more than one year after its due date. (Exhibit 5.)

868, 873-874.) The Supreme Court has disbarred attorneys whose failure to keep their official addresses current prevented them from learning that they had been ordered to comply with rule 9.20. (*Powers v. State Bar, supra*, 44 Cal.3d 337, 341.)

Respondent did not file an affidavit in compliance with rule 9.20 with the Clerk of the State Bar Court by July 22, 2008, as required by the Supreme Court Order. The fact that respondent eventually complied with his obligations under rule 9.20 does not avoid culpability for being late in that compliance. (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.)

Therefore, the court concludes that the State Bar has established by clear and convincing evidence that respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court in S161737.⁷

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating evidence was offered or received. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁸

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) In the underlying matter, respondent stipulated to, among other things, a four-year stayed suspension, three-year probation with conditions, including a two-year actual suspension. His misconduct included commingling personal funds in his client trust account (CTA), engaging in acts of moral turpitude, holding himself out as practicing or entitled to practice law when he was not an active member of the

⁷ Specifically, rule 9.20(d) provides that a suspended attorney's willful failure to comply with rule 9.20 constitutes a cause for disbarment or suspension and for revocation of any pending probation. Additionally, such failure may be punished as a contempt or a crime.

⁸ All further references to standards are to this source.

State Bar, charging or collecting illegal fees, and failing to promptly return unearned fees. (Supreme Court case No. 161737; State Bar Court case Nos. 06-O-10354, 06-O-13315, 06-O-13536, and 07-O-15030.)

Respondent committed multiple acts of wrongdoing, including violating several probation conditions and violating rule 9.20 of the California Rules of Court. (Std. 1.2(b)(ii).)

Respondent's failure to participate in this disciplinary matter prior to the entry of his default is a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 1.6, 1.7, and 2.6 apply in this matter.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 1.7(a) provides that if a member has a record of one prior imposition of discipline, the degree of discipline in the current proceeding must be greater than that imposed in the prior proceeding, unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust. Respondent has one prior record of discipline, which is not remote in time to the current proceeding. Nor were the offenses for which the prior discipline was imposed minimal in severity.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

The State Bar urges disbarment. The court agrees with the State Bar's recommendation.

In these two consolidated matters, respondent violated rule 9.20 and failed to comply with several conditions of his probation, in violation of section 6068, subdivision (k). Among his probation violations, respondent failed to timely submit quarterly reports.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.’” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent’s failure to timely file quarterly reports and comply with several other probation conditions warrants significant discipline.

Moreover, respondent's willful failure to comply with rule 9.20 is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Such failure to comply with rule 9.20 undermines its prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys, although he has been given opportunities to do so.

Additionally, failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him, nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

Accordingly, lesser discipline than disbarment is not warranted. In view of the serious and unexplained nature of respondent's misconduct, the lack of participation in these proceedings, the lack of any mitigating factors, the existence of a prior disciplinary record, and respondent's failure to comply with orders of the California Supreme Court, the court recommends disbarment as the only adequate means of protecting the public and the integrity of the legal profession.

VI. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **David Richard Ortega**, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

B. Restitution

It also recommended that respondent make restitution to the following:

1. **Jong Song** in the amount of \$1,830 plus 10% interest per annum from September 4, 2006 (or to the Client Security Fund to the extent of any payment from the fund to **Jong Song**, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

2. **Leticia Madrigal** in the amount of \$500 plus 10% interest per annum from August 22, 2006 (or to the Client Security Fund to the extent of any payment from the fund to **Leticia Madrigal**, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

Respondent must furnish satisfactory proof of payment thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

C. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁹

D. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

⁹ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: January 29, 2010

RICHARD A. HONN
Judge of the State Bar Court